

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

REPEX VENTURES S.A., on Behalf of Itself and All Others Similarly Situated,	)	
	)	
	)	
Plaintiff,	)	Civil Action No. 09-CV-289-RMB
	)	
v.	)	<u>CLASS ACTION</u>
	)	
BERNARD L. MADOFF; BANK MEDICI S.A.;	)	ECF CASE
SONJA KOHN; PETER SCHEITHAUER;	)	
HERALD USA FUND; HERALD LUXEMBURG	)	
FUND; BANK AUSTRIA CREDITANSTALT;	)	
UNICREDIT S.A.; PRIMEO SELECT FUND;	)	
PRIMEO EXECUTIVE FUND; PIONEER	)	
ALTERNATIVE INVESTMENTS; THEMA	)	
INTERNATIONAL FUND PLC; ERNST &	)	
YOUNG S.A., AND HSBC SECURITIES	)	
SERVICES, S.A.,	)	
	)	
Defendants.	)	
	)	

**REPLY IN FURTHER SUPPORT OF THE MOTION  
OF THE REPEX GROUP FOR APPOINTMENT AS LEAD  
PLAINTIFF PURSUANT TO § 21D(A)(3)(B) OF THE SECURITIES  
EXCHANGE ACT OF 1934 AND APPROVAL OF SELECTION OF LEAD COUNSEL**

## **I. ARGUMENT**

Movants Repex Ventures S.A. (“Repex”) and Radovan Fijember (jointly, the “Repex Group” or “Movant”) submit this reply in support of their motion to be appointed Lead Plaintiff. This reply addresses two points.

First, because the May 4, 2009 deadline for the application for appointment of lead plaintiff in the related action, *Leonhardt v. Madoff, et al.*, Case No. 09-cv-2032, (filed March 5, 2009), is undisturbed, Movant requests that ruling upon the various pending lead plaintiff motions in the present case be heard at the same time as the expected motions in the *Leonhard* action. In the alternative, Movant requests that Court order the pending lead plaintiff motions to be refiled on May 4, 2009.

Putting the lead plaintiff motions in the present case on the same track as the expected motions in the related *Leonhard* action will conserve judicial resources. If the Court appoints lead plaintiffs in the present action prior to May 4th, that decision may need to be revisited if motions to be appointed lead plaintiff are filed in the *Leonhard* action on May 4th. Staying the pending lead plaintiff motions, or ordering them to be refiled on May 4<sup>th</sup>, will avoid having this Court hear and decide two separate rounds of motions to appoint lead plaintiffs in these related actions. Furthermore, no one will be prejudiced by a short delay in appointing lead plaintiffs in the present action, especially when there may be future movants in the *Leonhard* action.

Second, if the Court wishes to endure two separate rounds of lead plaintiff motions, then Repex Ventures should now be appointed Co-Lead Plaintiff to represent purchasers of the Herald Funds. While the other movants, Nürnberger Versicherung Aktiengesellschaft Österreich (“Nürnberger”) and Dr. Shmuel Cabilly, can be appointed lead plaintiffs for purchasers of the Primeo Funds, they cannot satisfy Rule 23(a)’s “typicality” requirement to represent Herald

Fund purchasers because they lack standing to sue on their behalf. *Nürnberg* and Dr. Shmuel Cabilly lack standing to bring claims on behalf of Herald Fund purchasers because neither of them purchased or sold any Herald Funds. *Ont. Pub. Serv. Emples. Union Pension Trust Fund v. Nortel Networks Corp.*, 369 F.3d 27, 31 (2d Cir. 2004).

As the Herald Funds and the Primeo Funds each had different issuers, Bank Medici and Pioneer respectively, and these issuers are located in different countries, investors who purchased funds from these different issuers should have different lead plaintiffs appointed to represent their respective interests. Here, investors in the Primeo Funds cannot serve as lead plaintiffs for investors in the Herald Funds because they do not have standing. *Hoffman v. UBS-AG*, 591 F. Supp. 2d 522, 531 (S.D.N.Y. 2008)(plaintiffs lack standing for claims relating to funds that plaintiffs did not own); *In re Merrill Lynch Inv. Mgmt. Funds Sec. Litig.*, 434 F. Supp. 2d 233, 236 (S.D.N.Y. 2006)(plaintiffs who only owned shares in Merrill Lynch mutual funds do not have standing to assert claims on behalf of shareholders of other funds).

While courts often appoint purchasers of one type of securities to represent purchasers of other types of securities *of the same issuer* where the interests of those purchasers are aligned, (*Lifschitz v. Hexion Specialty Chems.*, 08 Civ. 6394, 2009 U.S. Dist. LEXIS 21933 at \* 4-5 (S.D.N.Y. Mar. 19, 2009) (emphasis added)), here the required “same issuer” does not exist. Instead of having the same issuer, the Herald Funds and Primeo Funds have different issuers, which require that investors who purchased securities from these two different issuers each have their own co-lead plaintiff. 434 F. Supp. 2d at 236. In the present case, it is appropriate to appoint a co-lead plaintiff from the Herald Fund purchasers and a co-lead plaintiff from the Primeo Fund purchasers to serve as lead plaintiffs. When the possibility that conflicts could arise exists, it is appropriate to protect the interests of the class by appointing a co-lead plaintiff.

*Davidson v. E\*Trade Fin. Corp.*, Civil Action No. 07 Civ. 10400, 2008 U.S. Dist. LEXIS 61265 at \*21 (S.D.N.Y. July 16, 2008).

Nürnberg argues that the Repex Group is somehow prohibited from serving a lead plaintiff because it is a two-member group. See Nürnberg Opposition at p. 9. The Repex Group consists of a single purchaser of Herald Funds and a single purchaser of Primeo Funds. Thus, such a group serving as co-lead plaintiffs is exactly what is required in the present case to ensure that the lead plaintiff will satisfy Rule 23's adequacy and typicality requirements for purchasers of both the Herald and Primeo Funds. While Radovan Fijember will not be co-lead plaintiff because he admittedly has not suffered the largest losses among the purchasers of Primeo Funds, Repex should still be appointed co-lead plaintiff to represent Herald Fund purchasers and serve along with whoever the Court appoints to as co-lead plaintiff from the Primeo Fund purchasers.

Dated: April 9, 2009

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify, this 9th day of April, 2009, that I caused a true and correct copies of the **REPLY IN FURTHER SUPPORT OF THE MOTION OF THE REPEX GROUP FOR APPOINTMENT AS LEAD PLAINTIFF PURSUANT TO § 21D(a)(3)(B) OF THE SECURITIES EXCHANGE ACT OF 1934 AND APPROVAL OF SELECTION OF LEAD COUNSEL** to be served via First Class Mail and First Class International Mail on all parties listed on the attached service list.

Dated: April 9, 2009

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